Supreme Court, U.S.
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In The

Supreme Court of the United States

October Term, 1987

HARRY LEMAIRE AND NAN PATTON, INDEPENDENT EXECUTRIX OF THE ESTATE OF RICHARD E. PATTON, DECEASED,

Petitioners,

v.

UNITED STATES OF AMERICA and MBANK ABILENE, N.A.,

Respondents.

PETITIONERS REPLY TO BRIEF OF RESPONDENTS MBANK ABILENE, N.A. AND UNITED STATES OF AMERICA

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I.

The purpose of Petitioners' reply to Respondents' Brief in Opposition to the Petition for Writ of Certiorari is to address the Solicitor General's contention that "there can be no preference [over Petitioners] unless the bank is insolvent, which is not the case unless the Petitioners' judgment is valid", Brief of U.S. at 7 n.3, and to correct crucial misstatements of fact by MBank Abilene, N.A. ("MBank").

II.

MBANK IS INSOLVENT AND IS MAKING PAYMENTS TO ITS OTHER CREDITORS IN VIOLATION OF SECTION 91

Both the Petitioners and the government agree that MBank is insolvent if Petitioners' state court judgment is valid. The government has sought to escape the consequences of the judgment by characterizing it as invalid, or less than valid, during the pendency of the state court appeal. The government's argument, however, is contradicted by well-settled state and federal law that judgments are presumed valid unless and until reversed. *Johnson v. Zerbst,* 304 U.S. 458, 460 (1938); *Matter of Chicago, Milwaukee, St. Paul & Pacific Ry,* 738 F.2d 209, 213 (7th Cir. 1984); *Phillips v. State Farm Mutual Auto Ins. Co.,* 437 F.2d 365, 368 (5th Cir. 1971); *Lowman v. Falsetti,* 335 F.2d 365, 368 (5th Cir.), *cert. denied* 379 U.S. 966 (1964); *Coleman v. Court of Appeals, Div. No. Two of State of Oklahoma,* 550 F. Supp. 681, 685 (W.D. Okla. 1980); *Little v. Celebrezzee,* 259 F. Supp. 9, 11 (N.D. Tex. 1966); *Aiken v. United States,* 191 F. Supp. 43, 50 (M.D. N.C.), *affirmed* 296 F.2d 604 (4th Cir. 1961); *Colleyville v. State,* 547 S.W.2d 659, 661 (Tex. Civ. App.—Fort Worth 1977, writ ref'd n.r.e.).

One might well question why the Federal Deposit Insurance Corporation ("FDIC") and the Office of the Comptroller of the Currency ("OCC") would seek to deny the insolvency of the bank if the only result is to delay the inevitable. The answer in this case, as perhaps no other, is clear. The delay in the enforcement of the judgment permitted the FDIC to redeem a $50,000,000.00 certificate of deposit which had not matured at the time the action was commenced. During the pendency of the preliminary injunction, on August 6, 1987, the FDIC redeemed the certificate of deposit and was paid over $50,000,000.00 by the bank.

Only twisted logic motivated by self-interest can justify the government's construction of Section 91. Query, the government's attitude toward the construction of Section 91 if it had held the valid judgment and Petitioners had held the $50,000,000.00 certificate of deposit? Wouldn't the government have argued that district court's denial of the presumed validity of the state court judgment amounted to a reversal of the judgment, subject to its affirmance on appeal, contrary to *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983) and *Rooker v. Fidelity Trust Company,* 263 U.S. 413 (1923)? Wouldn't the government have exercised its right to call upon McCorp, Inc., the sole shareholder of MBank, to contribute capital to its subsidiary to avoid its insolvency? Wouldn't it have declared, in the absence of protection of its judgment, the bank insolvent under Section 191 so that it could prevent preferential payments?

As it happened, Petitioners, despite all their efforts, because they lack the power granted to an agency of the

federal government, have been forced to sit, utterly helpless, and watch the assets of MBank dissipated and distributed to creditors. The feeling of helplessness, however, gives way to outrage with the realization that the principal beneficiary of the dissipation of MBank's assets is the protector of the public.

III.

MBANK'S MISSTATEMENTS

MBank's Statement of Facts contains several misleading statements which Petitioners are compelled to correct. In MBank's Brief in Opposition, it is alleged that a federal investigation of MBank, then called Abilene National Bank, led federal authorities to remove Abilene National Bank's management in mid 1982. In compliance with federal law, "the new MBank management continued to refuse to loan money to Petitioners' company." MBank Brief at 1. There is absolutely no evidence either in the record before this court or the record in the state proceedings in support of either of these asserted facts.

MBank further asserted that in 1984, "MBank instituted foreclosure proceedings against Petitioners on personal debts that were in default." *Id.* Nothing could be further from the truth. It was uncontroverted at the state court trial that Petitioners' notes were not in default and could not be demanded. In fact, MBank's unlawful attempt to foreclose on the collateral securing Petitioners' notes is precisely what began the state court litigation out of which this controversy has arisen.

MBank's contention that Petitioners' never raised subject matter jurisdiction in either the district court or

the Fifth Circuit, MBank Brief at 20-21, is also untrue. The very argument made by Petitioners concerning the subject matter jurisdiction of the federal courts to issue the preliminary injunction was addressed in the trial court in their Motion to Dismiss and in the Fifth Circuit in their Reply Brief at 19-20.

MBank, throughout this action, has attempted to distort the nature of the state court proceeding in an obvious effort to improperly collaterally attack the state court judgment. *See,* MBank Brief at 7, n. 4. Counsel for MBank is well aware of the inquiry they invite this court to make and that it is absolutely prohibited by this court's decision in *District of Columbia Court of Appeals v. Feldman,* 460 U.S. 462 (1983) and *Rooker v. Fidelity Trust Co.,* 263 U.S. 413 (1923).

Further, MBank, with no supporting authority, incorrectly argues that Congress intended 12 U.S.C. § 191 to be the exclusive remedy for Petitioners pending MBank's appeal. MBank Brief at 9. The fact of the matter is that unlike present day, at the time 12 U.S.C. § 191 was enacted, a bank's shareholders were liable for its debts. *Wheeler v. Kost,* 77 Ill. 296 (1875). Clearly, Section 191 was not the exclusive remedy of a bank's judgment creditor.

MBank's argument that 28 U.S.C. §§ 2412(d)(1)(B) and 2414 (1982) define "final judgment" as one from which no appeal can be taken, MBank Brief at 12, merely begs the question. Contrary to MBank's position, these statutes merely show that Congress, when it intends to alter the ordinary meaning of final judgment, knows that it should so define it.

MBank has distorted Petitioners' argument that *Congress* had not granted any exemptions from the requirement of posting a supersedeas bond, other than the sovereign, by noting that a number of *states* have exceptions to their supersedeas bond requirements. Nonetheless, the court will note the exemptions provided by states deal largely with those who have already posted bonds to protect creditors from dissipation of assets during the administration of an estate. Hence, no further bond would be necessary.

CONCLUSION

To uphold the Fifth Circuit by denying Petitioners' Petition for Writ for Certiorari not only results in a construction and application which wreaks havoc on the statutory scheme regulating national banks but converts an anti-preference statute into a pro-preference statute to the detriment of valid judgment creditors.

PRAYER

Petitioners respectfully request that a writ of certiorari issue.

Respectfully submitted,

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